being used for a public lottery cannot in my view, be said to assist the purchaser in carrying on such lottery merely by reason of the sale. Further participation of the vendor in the purchaser's activities is a necessary ingredient of the offence. This is because they had no further connection one with the other after sale and delivery. One purchaser might keep the outfit he purchased without using it. Another might innocently use it for a children's party without committing any offence, as envisaged by Suffian J. in *Public Prosecutor* v. *Seow Boon Hooi.*[1] It cannot be assumed that every purchaser must necessarily use it for the purpose of a public lottery, and in the instant case, there is no evidence whatsoever that any lottery had been carried on or contemplated by the only person who had bought a board from the appellant. Even assuming that P.W.1 did carry on a lottery, the facts of this case are sufficiently clear that the appellant lifted not a finger to assist P.W.1 in committing the offence. The decision rested with P.W.1 alone — or any other customer of the appellant's whether or not to carry on a lottery with the board he owned. If the customer chooses not to do so, there can never be a lottery carried on, and therefore the appellant cannot be said to be assisting in something non-existent.

Furthermore, the necessary *mens rea* was absent, because the true intention of the appellant — to be gathered from the circumstances — was to sell an article, not to assist in, promote or instigate the commission of an offence against the Ordinance.

I need not advert to the alternative charge because there was no evidence of any lottery carried on or even contemplated.

For the above reasons, I allowed the appeal and quashed the conviction and sentence and ordered the 205 boards seized to be returned to the appellant.

I would add, in conclusion, that if there is a *lacuna* in the law, and it is deemed desirable in the public interest to make it an offence to place such devices as a "tikam" board at the disposal of those who might use it for illegal purposes, then that *lacuna* can only be filled by the legislature.

Appeal allowed.

Solicitors: *Shook Lin & Bok.*

KAMPONG KUANTAN RUBBER CO. LTD. v. V.K.G. MENON

[O.C.J. (Ong J.) April 2, 1964]

[K.L. — Civil Suit No. 634 of 1963]

Practice and Procedure—Defendant resident abroad —Order for issue of writ of summons on defendant for service outside jurisdiction—Further order for substituted service on solicitor resident within jurisdiction—Service of writ and not notice of writ under order for substituted service—Whether service valid—R.S.C. 1957 O. 11 rr. 3A, 6, First Schedule 4 and Form 6.

In this case the plaintiff claimed the sum of $31,102.66 from the defendant a former employee of the plaintiff. The defendant was resident in India and the plaintiff applied for and obtained on September 19, 1963 an order under Order 11 r. 3A that (a) it be at liberty to issue a writ of summons against the defendant (b) it be granted leave to issue a writ of summons against the defendant for service outside the jurisdiction in India and (c) time for appearance to the said writ by the defendant be within 31 days after the "service of the said writ or notice in lieu thereof". Pursuant to the said order the writ (in Form 4) was issued on September 23, 1963. No notice of writ to be served out of jurisdiction (as in Form 6) was issued. Subsequently on November 11, 1963 the plaintiff obtained a further order "that the writ of summons or the notice of writ to be served out of jurisdiction be served on Mr. Athi Nahappan (a solicitor)....and that such service be deemed good and sufficient service on the defendant...."

Service of the Form 4 writ was effected on Mr. Athi Nahappan on December 13, 1963 and on January 2, 1964 he entered conditional appearance for the defendant without prejudice to an application to set aside the writ and service thereof. On January 11, 1964 notice of motion was filed to set aside the writ or service of the writ on the grounds that (1) the order of September 19, 1963 was not an order for service and the writ had in fact been issued before an order for service had been obtained and (2) the notice and not the writ should have been served.

Held: (1) the order of September 19, 1963 though not drawn in unequivocal terms was an order for service of the writ itself (and not the notice of the writ) but the error was cured by providing for service of "the said writ of notice in lieu thereof" at the end of the order. There was at most an unfortunate terminological slip which was a curable irregularity and as the writ was issued on September 23, 1963 it was issued after the order;

(2) substituted service of the writ on Mr. Athi Nahappan was a nullity and therefore the service on him must be set aside.

Cases referred to:—

(1) *Hewitson* v. *Fabre* (1888) 21 Q.B.D. 6, 9.

(2) *Fry* v. *Moore* (1889) 23 Q.B.D. 395, 399.

(3) *Field* v. *Bennett* 56 L.J. (Q.B.) 89.

(4) *Hillyard* v. *Smyth* 36 W.R. 7.

(5) *Wilding* v. *Bean* [1891] 1 Q.B. 100.

APPLICATION.

S. D. K. Peddie for the plaintiff.

V. K. Palasundaram for the defendant.

Ong J.: The plaintiff claims from the defendant, its former chief clerk, the sum of $31,102.66 alleged to have been overdrawn by him while in the service of the plaintiff. The defendant, an Indian who is neither a citizen of the Federation nor a subject of the Ruler of any State, now resides in India, at an address unknown to anybody but his solicitor Mr. Athi Nahappan.

Under R.S.C. Order 11, rule 6, notice of the writ, and not the writ itself, has to be served, and, in the circumstances, it was thought by the

plaintiff's solicitors that the best method of bringing the claim to the defendant's attention was by substituted service on the solicitor, Mr. Athi Nahappan.

Accordingly, pursuant to Order 11 rule 3, they filed, on August 29, 1963 (i) the proposed writ, in Form 4, entitled "Writ for Service Out of the Jurisdiction or *Where Notice of Writ is to be Served Out of the Jurisdiction*"; (ii) a summons in chambers applying for an order that the intended plaintiff "be at liberty to issue a writ of summons against V.K.G. Menon the abovenamed intended defendant and for an order that the said intended plaintiff be granted leave to issue a writ of summons against the intended defendant for service outside the jurisdiction in India and that the time for appearance to the said writ by the intended defendant be within 31 days after the service the said writ or *notice in lieu thereof*"; and (iii) an affidavit by the plaintiff's managing director in support of the application.

On September 19, 1963 the Senior Assistant Registrar made an order in terms of the summons as follows:

"*IT IS ORDERED* that the abovenamed intended plaintiff be and is hereby at liberty to *issue* a Writ of Summons against V.K.G. Menon the abovenamed intended defendant *AND IT IS ORDERED* that the said intended plaintiff be and is hereby granted leave to issue a Writ of Summons against the intended defendant *for service* outside the jurisdiction in India *AND IT IS LASTLY ORDERED* that the time for appearance to the said writ by the intended defendant be within 31 days after the service of the said writ or *Notice* in lieu thereof."

Pursuant to the above order the writ (in Form 4) was issued on September 23, 1963. No notice of writ to be served out of jurisdiction (as in Form 6) was issued.

On November 11 the plaintiff obtained an order for substituted service in these terms:

"*IT IS ORDERED* that the Writ of Summons or the Notice of Writ to be Served Out of Jurisdiction herein be served on Mr. Athi Nahappan....and that such service be deemed good and sufficient service on the defendant above-named."

Service of the Form 4 writ (*not* notice of writ) was effected on Mr. Athi Nahappan on December 3, and on January 2, 1964 Mr. Athi Nahappan entered conditional appearance for the defendant without prejudice to an application to set aside the writ and service thereof. On January 11 notice of motion was filed on behalf of the defendant "for an order setting aside the writ and/or service of the writ and/or discharging the issue and/or the order for the issue of the writ and/or the order for service of the writ on Athi Nahappan."

The grounds of objection are, first: that the writ was issued before an order was made for service of the writ or notice of writ, and, because the order of September 19, 1963 was not an order for service, the issue of the writ was bad in law. The point raised here was non-compliance with rule 3A of Order 11 which reads:

"3A* (1) Before applying under this Order, the applicant shall produce the proposed writ or originating summons and the summons for leave to issue it, to the Registrar, who shall provisionally assign a serial number to the writ and summons.

(2) After an order for issue and service has been made under this Order, the Registrar shall issue the writ or notice completed in accordance with the terms of the order."

I think the objection on this ground is unfounded. The order in question, though not drawn in unequivocal terms as it should have been, did in its three parts make an order specifically (a) for issue of a Form 4 writ of which notice is to be served out of the jurisdiction, (b) for service of such writ itself, which was wrong, but the error was cured forthwith by (c) providing for service of "the said Writ or *Notice in lieu thereof*." There was thus at most an unfortunate terminological slip which is a curable irregularity. The writ was issued on September 23, or four days after the order, not before such order.

The second objection was that service of the writ on Mr. Athi Nahappan was bad. It was contended that the order of November 11, 1963 for substituted service on Mr. Athi Nahappan of the writ which the law would not permit to be served on defendant himself was bad in law, because under Order 11 rule 6, only notice of the writ, and not the writ itself, should be served on the defendant.

On this point I would make the preliminary observation that, had Mr. Athi Nahappan agreed to accept service and undertaken to appear for the defendant, then the writ could have been issued against the defendant with a foreign address, where it was not intended to serve it out of the jurisdiction: (see *1961 Annual Practice*, p. 15). In that event, there would have been no grounds of objection by the defendant. In this case, however, what in fact came to be issued for service was a writ, not notice of writ. Service of the writ on the defendant abroad would have been a nullity. As Wills J. said in *Hewitson* v. *Fabre*: [1]

"The language of Order XI, r. 6, is perfectly clear and explicit. The defendant was a foreigner residing in a foreign country, and the writ was served on him abroad. Such a service is no service at all, for it is forbidden by the rules, and unless some act amounting to an estoppel has been done by the defendant, the service is wrong and wholly void."

But was substituted service of the writ (in Form 4) on Mr. Athi Nahappan within the jurisdiction good service? The answer to this question is to be found in *Fry* v. *Moore* [2] where Lopes L.J. said:

"*Field* v. *Bennett* [3] and *Hillyard* v. *Smyth* [4] appear to me to establish clearly that there cannot be substituted service of a suit which could not at the time when it was

issued be served personally. In the present case the writ could not be personally served because no leave had been obtained to issue it, as rule 4 of Order II requires, when the defendant is out of the jurisdiction. Therefore, the order for substituted, service was irregular. If we were to hold that service effected in this way was regular we should render all the rules relating to service out of the jurisdiction absolutely useless. If a defendant was out of the jurisdiction the plaintiff would only have to obtain an order for substituted service of an ordinary writ, and then every other step in the action could proceed in the ordinary way."

In that case, however, the Court held that the defendant had waived the irregularity and was not entitled to have the judgment set aside.

Fry v. *Moore* was followed in *Wilding* v. *Bean* [5] from which I quote Lord Esher M.R.:—

"It was said, and I think rightly said, in *Fry* v. *Moore* that, where the writ cannot be served on a person directly, it cannot be served indirectly by means of substituted service. As long as the defendant is abroad, such a writ as this cannot be served upon her personally. Therefore it cannot be served by substituted service."

In the instant case, the writ itself could not have been served on the defendant. Hence substituted service of the writ on Mr. Athi Nahappan was void. The order of November 11, 1963 however, did expressly state that "notice of writ to be served out of the jurisdiction herein be served on Mr. Athi Nahappan", which was in fact not complied with. Substituted service of the notice of writ would have been proper and valid. As Lopes L.J. stated in *Wilding* v. *Bean*: "If the plaintiff could have established the fact that the defendant left England to evade service of the writ, I think the order for substituted service might have been sustained." Such a case of evading service had been made out by the plaintiff.

The proper order in the circumstances, therefore, will be an order setting aside only the service of the writ on Mr. Athi Nahappan and all proceedings subsequent thereto, but no order as to the rest of the application set out in the notice of motion. Costs of this application to defendant in any event.

Order accordingly.

Solicitors: *Skrine & Co.; Athi Nahappan & Co.*

LAM SOON OIL & SOAP MANUFACTURING LTD. v. IMPEX SYNDICATE LTD.

[F.C. (Barakbah C.J. (Malaya), Wee Chong Jin C.J. (Singapore) & Tan Ah Tah F.J.) April 6, 1964]

[Singapore — Federal Court Civil Appeal No. 56 of 1963]

Contract—F.O.B.—April/May option of seller—Nomination by buyer of last ship in May—Failure by seller to ship—Breach of contract.

Appeal—Question of fact—Grounds on which appellate tribunal may reverse trial Judge's finding.

The appellants entered into a written contract for the sale of 50 tons of palm oil to the respondents, F.O.B. Port Swettenham. One of the terms of the contract was that delivery was to be by shipment in April/May 1959 at the appellants' option. The respondents contended that by a telephone conversation with the appellants they had nominated a ship, as they were required to do, which was the last ship to leave Port Swettenham for the port of destination. The appellants denied that such nomination had been made. The trial Judge came to the conclusion that the respondents' version was to be believed and that the material evidence of the appellants was untrue.

On appeal it was argued that the conduct of the respondents subsequent to the alleged breach of the contract by the appellants was inconsistent with their claim that shipping instructions were given. It was particularly stressed that respondents had failed (1) to confirm in writing the oral instructions which they said they had given (2) to place on record that shipping instructions had not been complied with (3) to give notice to the appellants that they would have to buy on the open market and (4) on expiry of contract to give notice to the appellants that they treated the appellants as having repudiated the contract.

Held: these were matters brought out at the trial and therefore considered by the trial Judge when assessing credibility of witnesses. Taken as a whole they did not lead inescapably to the conclusion that the evidence of the respondents' witness was untrue.

Grounds on which an appellate court should act in reviewing the decision of a judge of first instance discussed.

Principles reiterated in *Tay Kheng Hong* v. *Heap Eng Moh Steamship Co. Ltd.* [1] followed.

Case referred to:—

(1) *Tay Kheng Hong* v. *Heap Eng Moh Steamship Co. Ltd.* [1964] M.L.J. 87, 91, 92.

FEDERAL COURT.

J. Grimberg for the appellants.

Kirpal Singh for the respondents.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal from the judgment of Ambrose J. in the High Court of Singapore dismissing the appellants' claim for damages for breach of a contract for the purchase of 50 tons of palm oil and awarding the respondents $3,375.00 by way of damages for the appellants' breach of contract in failing to ship the palm oil under the contract.

The contract, dated 13th April 1959, was for the sale by the appellants to the respondents of 50 tons Malayan red palm oil at $842.00 per ton F.O.B. Port Swettenham. One of the terms of the contract was that delivery was to be by shipment in April/May 1959 at the appellants' option.

The sole issue at the trial was whether on 13th May 1959 H. K. Doshi, the secretary of the respondents, telephoned Whang Tar Choung, the managing director of the appellants, and gave the latter oral instructions to ship the contract oil on a ship "Star Betelgeuse" calling at Port Swettenham on or about 20th May 1959. It was common ground that in April 1959 the respondents had given written instructions to the appellants to ship the oil on the "Straat Torres" a ship